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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 KATE JOHNSTON, DEAN OLSON, JERRY  
11 BERGMAN, and MARIA C. "TINA"  
12 CHILDRESS, individually and on behalf of all  
13 others similarly situated, THE WASHINGTON  
14 STATE COMMUNICATION ACCESS  
PROJECT, a Washington Corporation, and  
ASSOCIATION OF LATE DEAFENED  
ADULTS (ALDA),

15 Plaintiffs,

16 v.

17 FATHOM EVENTS JV, LLC, REGAL  
18 ENTERTAINMENT GROUP, AMC  
19 ENTERTAINMENT INC., and CINEMARK  
HOLDINGS, INC.,

20 Defendants.

NO. 2:18-cv-00011

**CLASS ACTION COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF UNDER THE AMERICANS  
WITH DISABILITIES ACT AND THE  
WASHINGTON LAW AGAINST  
DISCRIMINATION**

21 **I. INTRODUCTION**

22 Fathom Events is a multi-million dollar joint venture of America's three largest movie-  
23 theater chains to bring content like Metropolitan Opera productions, Broadway and London  
24 theater productions, classic movies and similar events to movie theaters across the country.  
25 With locations in every state, Fathom enables people in areas like Port Townsend, Washington,  
26 Twin Falls, Idaho and Sioux Falls, South Dakota to enjoy a Broadway musical or the Bolshoi  
27 ballet on the big screen in high definition, a better seat than people who attend live.

1 But one group of people has been conspicuously omitted by Fathom – people like  
 2 Plaintiffs whose sensory disabilities are significant enough that the available accommodations  
 3 like volume-enhancing assistive-listening devices are not enough to enable them to understand  
 4 and fully enjoy the presentations. Those people need captioning, in which the dialogue and  
 5 lyrics are put into writing and displayed in sync with the pace of the production, enabling these  
 6 people to “hear” with their eyes. With the singular exception of Metropolitan Opera supertitles  
 7 – translations of the librettos into English – none of the Fathom Events are captioned. When  
 8 approached, Fathom has told Plaintiffs that it cannot provide captioning, and has no legal  
 9 obligation to do so.

10 For reasons specified in this Complaint, we believe both of those assertions are  
 11 incorrect. Access can be provided, and if it can be done, federal and state disability laws require  
 12 that it must be done. Plaintiffs are not seeking monetary damages, but only injunctive and  
 13 declaratory relief to the effect that Fathom must, to the extent possible, provide access through  
 14 captioning to plaintiffs and the millions of similarly situated individuals across the nation.

## 15 II. JURISDICTION AND VENUE

16 1. This Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1331 because  
 17 the claims are being made pursuant to a federal statute, the Americans with Disabilities Act  
 18 (ADA) and particularly under the provisions in Title III of that Act dealing with auxiliary aids  
 19 and services, 42 U.S.C. § 12812(b)(2)(A)(iii) and modification of policies and procedures, 42  
 20 U.S.C. § 12812(b)(2)(A)(ii). This Court may grant equitable relief pursuant to 42 U.S.C. §  
 21 12188(a)(1) and (2), and may award fees, expenses and costs to a prevailing party pursuant to  
 22 42 U.S.C. § 12205.

23 2. This Court has pendent jurisdiction over claims brought under the Washington  
 24 Law Against Discrimination, RCW 49.60, which claims arise out of the same nucleus of facts  
 25 as the claims under federal law.

26 3. This Court has personal jurisdiction over the non-resident defendants because  
 27 they conduct continuous and systematic business in the Western District of Washington, and

1 because this cause of action arises out of those activities and the impact of those activities on  
2 Plaintiffs.

3 4. Venue is proper in this district and division because some of the acts and  
4 omissions at issue in this litigation occurred here.

### 5 **III. THE PARTIES**

6 5. Plaintiff Johnston is a resident of Bellevue, Washington. She wears two cochlear  
7 implants, prosthetic devices that stimulate the auditory nerve and provide a sensation of  
8 hearing. When she removes the external processors, she is totally deaf.

9 6. Plaintiff Olson is a resident of Edmonds, Washington. He wears two cochlear  
10 implants, and is totally deaf without the external processors.

11 7. Organizational plaintiff Washington State Communication Access Project  
12 (Wash-CAP) is a non-profit Washington membership corporation comprised principally of  
13 people with significant hearing loss. Its mission is to expand access to public life for such  
14 people through education, persuasion and, where necessary, litigation. Olson is president of  
15 Wash-CAP, and Johnston is a member.

16 8. Plaintiff Childress is a resident of Champaign, Illinois. She also wears two  
17 cochlear implants, and is totally deaf without them.

18 9. Plaintiff Bergman is a resident of New York City, New York. He has a severe  
19 bilateral hearing loss, and wears one cochlear implant and one hearing aid.

20 10. Organizational Plaintiff Association of Late Deafened Adults (ALDA) is a  
21 nationwide non-profit organization incorporated in Illinois. Part of its mission is advocating for  
22 the interests of its members and people similarly situated.

23 11. None of the named Plaintiffs and few, if any, of the members of the  
24 organizational Plaintiffs are able to fully understand and enjoy Fathom Events without  
25 captioning due to their hearing losses.

26 12. Defendant Fathom is a limited liability company headquartered in Greenwood  
27 Village, Colorado. It is owned equally by Defendants Regal, AMC and Cinemark.



1 gooseneck with a heavy base that fits into the cup-holder, and can be adjusted to place the  
2 captions in the same line of sight as the movie screen.

3 **Fathom' Content.**

4 19. Fathom's business is providing special "events" at movie theaters, which it  
5 transmits through a proprietary digital broadcast network. Those events are generally scheduled  
6 for times and dates when movie attendance ebbs. [http://corporate.fathomevents.com/our-](http://corporate.fathomevents.com/our-platform/)  
7 [platform/](http://corporate.fathomevents.com/our-platform/) (last visited Dec. 31, 2017).

8 20. Fathom offers a broad variety of events, including classic movies, Metropolitan  
9 Opera performances, Broadway and London stage performances and specials made for  
10 television. In addition to the events themselves, Fathom offers extra material, including  
11 intermission interviews, commentary and other bonus features that are not available to patrons  
12 who attend the event in person or who watch the classic movies at home.

13 21. The lineup of participating theaters varies according to the specific event that  
14 Fathom is offering, but always includes a number of theaters in the metropolitan Seattle area.  
15 The Metropolitan Opera production of "Tosca" will be shown at the Pacific Place 11 in Seattle,  
16 the Oak Tree 6 in Seattle, the Southcenter 16 in Tukwilla and the Kent Station 14, all AMC  
17 theaters, the Thornton Place 14 in Seattle, Bella Bottega in Bellevue and Alderwood 7, all  
18 Regal theaters, and the Lincoln Square Cinemas in Bellevue, a Cinemark theater. The classic  
19 movie "Treasure of Sierra Madre" will be shown at all of those theaters except Oak Tree, and  
20 will be shown at an additional Regal theater, Auburn 17.

21 22. While the box-office revenue for movies slumped in 2017, Fathom  
22 Events had its best year ever, according to an article in "Variety" that Fathom posted on its  
23 proprietary website. [http://variety.com/2017/film/news/box-office-fathom-events-2017-](http://variety.com/2017/film/news/box-office-fathom-events-2017-performance-1202643479/)  
24 [performance-1202643479/](http://variety.com/2017/film/news/box-office-fathom-events-2017-performance-1202643479/) (last visited Dec. 31, 2017). According to that article, 26 separate  
25 events in 2017 generated revenue of over \$1 million, compared to 14 events in 2016 hitting that  
26 milestone. Big-screen classis movies and Metropolitan Opera performances were the most  
27 frequent million-dollar draws.

1           23.     Although the vast majority of the events that Fathom offers have had captions  
2 prepared for some mode of presentation, such as television broadcast, live-theater performance  
3 or DVD sale, those captions are not made available at the movie theaters showing the Fathom  
4 events other than the limited exception of opera supertitles.

5           **Plaintiffs' Experiences with Fathom.**

6           24.     Plaintiff Johnston went to one of the classic movies at the Lincoln Square  
7 Cinemas in Bellevue, owned by Cinemark, but discovered that the movie was not captioned,  
8 and was therefore not accessible to her. She would attend other Fathom events if they were  
9 accessible to her.

10          25.     Plaintiff Olson wanted to see the Fathom presentation of "Winter's Tale" from  
11 the National Theatre in London with Kenneth Branagh and Judi Dench at the Sundance Theatre  
12 in Seattle (now owned by AMC), but learned that it was not captioned, and did not attend. He  
13 would attend other Fathom events if they were accessible to him.

14          26.     Plaintiff Childress wanted to see the Broadway musical "Allegiance," which  
15 Fathom was bringing to her local theater in Savoy, Illinois, on Dec. 7, 2017. When she  
16 contacted the "Allegiance" production team, she was told that the Fathom presentation would  
17 not be captioned. The producers stated that it had provided captions, but that Fathom said that  
18 its transmission system was not usable with the captioning devices the theaters have installed.

19          27.     Plaintiff Bergman enjoys the Metropolitan Opera, and especially likes the  
20 Fathom presentations because the camera can get the theater audience so much closer to the  
21 performers than even the live audience at Lincoln Center in New York City can get. While the  
22 supertitles – the English translations of the librettos – are visible, Bergman also wants to enjoy  
23 the intermission interviews and behind-the-scenes features that Fathom brings to the AMC  
24 Empire 25 and the Regal Union Square 14 near his home, and those are not captioned and  
25 therefore not accessible to him. When he and other individuals in the New York City area  
26 asked about captioning for those intermission interviews and special events, Metropolitan  
27 Opera personnel told him that it was the responsibility of the theaters.

28. On information and belief, it is technically possible and feasible to make captioning available for most if not all Fathom events by re-formatting captions to make them compatible with the theaters' existing caption-viewing devices and/or by providing an alternative means of viewing the captions, such as a smart-phone application.

## V. CAUSES OF ACTION

### Count 1 -- Violation of the Americans with Disabilities Act (ADA).

29. Plaintiffs repeat the allegations of Paragraph 1-28 of the Complaint, and incorporate them as if fully set forth.

30. Individual plaintiffs are all persons with a disability as defined in the ADA. Their deafness interferes with the major life activity of hearing, 42 U.S.C. § 12102(2)(A). Their status as people with disabilities entitled to the protections of the ADA must be measured without regards to the ameliorative effects of hearing aids or cochlear implants, 42 U.S.C. § 12102(4)(e)(i)(I).

31. Most members of the organizational plaintiffs Wash-CAP and ALDA are also persons with hearing disabilities within the meaning of the ADA, or are the spouses or companions of such people.

32. The movie theaters owned and operated by Defendants Regal, AMC and Cinemark are "places of public accommodation" under the Title III of the ADA, and are subject to the obligations that apply to such places. 42 U.S.C. § 12181(7)(C).

33. The ADA prohibits Title III "places of public accommodation" from denying individuals with disabilities the opportunity to participate in or benefit from the goods, services, privileges, advantages or accommodations offered to others, 42 U.S.C. § 12182(b)(1)(A)(i), or from offering benefits not equal to those offered to others, 42 U.S.C. § 12182(b)(1)(A)(i).

34. The statutory prohibitions against discrimination by "places of public accommodation" prohibit not only direct acts or omissions by the specific business, but extends to actions undertaken "through contractual, licensing or other arrangement," *Id.* The involvement of Fathom as a separate entity does not alter the obligations that Regal, AMC and

1 Cinemark would owe to the plaintiffs if Fathom did not exist, or alternatively, the ADA  
 2 imposes upon Fathom as an alter ego the obligations of Regal, AMC and Cinemark as movie-  
 3 theater owners.

4 35. Prohibited discrimination by a place of public accommodation under the ADA  
 5 includes “a failure to take such steps as may be necessary to ensure that no individual with a  
 6 disability is excluded, denied services, segregated or otherwise treated differently than other  
 7 individuals because of the absence of auxiliary aids and services.” 42 U.S.C. §  
 8 12182(b)(2)(A)(iii).

9 36. The ADA defines “auxiliary aids and services” as “qualified interpreters or other  
 10 effective methods of making aurally delivered materials available to individuals with hearing  
 11 impairments,” 42 U.S.C. § 12103(1)(A). Implementing regulations specify that open and closed  
 12 captioning are auxiliary aids and services within the meaning of the ADA. 28 C.F.R. §  
 13 36.303(b)(1).

14 37. The ADA also requires places of public accommodation to “make reasonable  
 15 modifications in policies, practices, or procedures, when such modifications are necessary to  
 16 afford such goods, services, facilities, privileges, advantages, or accommodations to individuals  
 17 with disabilities,” 42 U.S.C. § 12182(b)(2)(A)(ii).

18 38. Fathom, Regal, AMC and Cinemark are therefore required by the ADA to  
 19 provide auxiliary aids and services like captioning to make Fathom events accessible to  
 20 plaintiffs and others similarly situated, and to alter any policies, practices and procedures  
 21 necessary to accomplish those objectives.

22 **Count 2 – Violation of the Washington Law Against Discrimination.**

23 39. Plaintiffs repeat the allegations of Paragraph 1-34 of the Complaint, and  
 24 incorporate them as if fully set forth.

25 40. That Washington Law Against Discrimination (WLAD), RCW 49.60, defines  
 26 “places of public accommodation” as including any place conducted for entertainment, RCW  
 27



49.60.040 (definitions), which includes movie theaters. *Washington State Comm. Acc. Project v. Regal Cinemas et al.*, 293 P.3d 413, 421 (Wash. App. 2013).

41. Pertinent regulations require places of public accommodation to provide “reasonable accommodations” to make their services equally available to people with disabilities. WAC 162-26-080. “Reasonable accommodation” is “action, reasonably possible in the circumstances, to make the regular services of a place of public accommodation accessible to persons who otherwise could not use or fully enjoy the services because of the person's sensory, mental, or physical disability,” and “accessible” is defined as “usable or understandable by a person with a disability,” WAC 162-26-040.

42. Fathom, Regal, AMC and Cinemark are required by the WLAD to take all reasonably possible steps to make Fathom’s offerings accessible to plaintiffs and similarly situated individuals through captioning.

## VI. CLASS ACTION ALLEGATIONS

43. Plaintiffs repeat the allegations of Paragraphs 1-38 of the Complaint, and incorporate them herein.

44. Plaintiffs bring this action pursuant to Rule 23(b)(3), Federal Rules of Civil Procedure. Plaintiffs ask the Court to certify a class described as follows:

**All individuals with hearing loss who require captioning to understand and fully enjoy Fathom Events, and who wish to attend a Fathom Event but are either deterred from doing so by the absence of captioning or who do attend but cannot fully enjoy the event because they cannot fully understand the spoken and sung content of the presentation.**

45. The requirements of Rule 23(b)(3) are met for the following reasons:

a. **Numerosity** – An individual’s ability to comprehend speech depends on a number of variables, most notably the listening environment. A theater is a particularly challenging environment for a number of reasons. The listener may not be able to use common mechanisms of supplementing auditory information, such as speech-reading, and obviously cannot use other coping mechanisms such as the ability to ask the speaker to repeat or re-

1 phrase. Context often helps people understand speech by enabling them to anticipate what will  
 2 be said, but the essence of drama or especially comedy comes from the unexpected moment  
 3 where the context changes, and it is that critical content that people with hearing loss most  
 4 frequently miss. Song lyrics are particularly difficult because background noise – even pleasant  
 5 background noise like the musical score – makes it more difficult to distinguish words.

6 According to the federal Center for Disease Control, some 15% of adult Americans  
 7 report having some difficulty hearing. [http://www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_260.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_260.pdf)  
 8 (see p.13). While no precise numbers can be given, suffice it to say that a significant proportion  
 9 of the actual and potential audience for Fathom Events cannot understand dialogue and lyrics  
 10 through hearing alone. Moreover, there is simply no way to identify those individuals because  
 11 any available information would be protected by medical privacy rules.

12 b. **Commonality and Typicality** – There are no questions of law or fact unique to  
 13 named Plaintiffs, Wash-CAP or ALDA. The undisputed fact is that Fathom Events are not  
 14 captioned. Plaintiffs allege that the ADA requires Fathom and the theater defendants to provide  
 15 captioning. Any available affirmative defenses apply equally to named Plaintiffs and to class  
 16 members. Because Plaintiffs seek only declaratory and injunctive relief, and do not seek  
 17 damages, there are no individual issues.

18 c. **Fair and adequate representation** – There is no conflict between the demands  
 19 of names Plaintiffs, Wash-CAP and ALDA for captioning and the interests of other potential  
 20 patrons who might want captioning, nor does this demand conflict with the interests of patrons  
 21 who want other aids and services.

22 Undersigned pro hac vice counsel has had considerable experience in actions of this  
 23 nature. He represented ALDA. He represented (Wash-CAP) in *Washington State*  
 24 *Communication Access Project v. Regal Cinemas et al.*, 293 P.3d 413, 173 Wn. App. 174  
 25 (Wash.App. 2013), and represented ALDA in California litigation against Cinemark and a  
 26 settlement with AMC. He is also part of a group advising Broadway Theaters on new methods  
 27 of providing captioning for every performance, some of which methods may prove applicable

1 to Fathom Events presentations. Local counsel have extensive experience with class-action  
2 cases.

3 46. A class action is superior to other available methods for adjudicating this  
4 controversy. Because we are asking certification for only those people who would benefit from  
5 captioning, and are explicitly not asking Fox to discontinue any other auxiliary aids and  
6 services it is presently providing or attempting to preclude any aids and services Fox may  
7 provide in the future, none of the class members have any interest in individually controlling  
8 the prosecution of any separate action. We do not anticipate any difficulties in managing the  
9 requested class.

#### 10 **PRAYER FOR RELIEF**

11 47. Plaintiffs are entitled to relief as follows pursuant to the provisions of 42 U.S.C.  
12 § 12188(a)(1), which incorporates the remedies of 42 U.S.C. §2000-a(3)(a):

13 a. For a declaratory judgment stating that the ADA requires Defendants to  
14 provide captioning for Fathom Events presentations, and for a nationwide injunction requiring  
15 them to do so;

16 b. For a declaratory judgment stating that the WLAD requires Defendants  
17 to provide captioning for Fathom Events presentations, and for a statewide injunction requiring  
18 them to do so;

19 c. If and to the extent that Defendants demonstrate that no presently  
20 existing technology, individually or in combination, can enable Fathom Events to be presented  
21 with captions, for a declaratory judgment stating that Defendants must be offer captions  
22 whenever it does become technically possible and not unduly burdensome with the meaning of  
23 the ADA or not reasonably possible within the meaning of the WLAD, and for an injunction  
24 requiring Defendants to publicize their interest in finding and implementing such a solution;

25 d. For all costs of court, including reasonable attorneys' fees, pursuant to  
26 42 U.S.C. § 12205 and RCW 49.60.030(2).

27 e. For such other and further relief as may be appropriate.

DATED this 4th day of January, 2018.

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